

NO. 43645-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

JOHN SCOTT LONERGAN, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-01929-2

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BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERRORS

I. LONERGAN'S COUNSEL WAS NOT INEFFECTIVE AS THE TRIAL COURT WOULD HAVE FOUND HIS TWO CONVICTIONS DID NOT CONSTITUTE SAME CRIMINAL CONDUCT.

B. STATEMENT OF THE CASE

John Lonergan (hereafter "Lonergan") and Marisa Cadman were involved in a dating relationship from February 2011 to October 2011. RP Vol. 1 at 44. Ms. Cadman described their relationship as erratic and indicated they broke up and got back together several times over the course of their relationship. RP Vol. 1 at 43-44. Lonergan has been violent towards Ms. Cadman during their relationship. RP Vol. 1 at 60. During one incident in the summer of 2011, Lonergan came over to her house while she was sleeping and started screaming at her. RP Vol. 1 at 60. Lonergan got on top of her and started shaking her and put his hands around her neck on that occasion. RP Vol. 1 at 61. During another incident, Lonergan punched a hole in her locked bedroom door. RP Vol. 1 at 61. During another incident Lonergan became upset with Ms. Cadman and grabbed her and shook her leaving bruises. RP Vol. 1 at 61. Lonergan also caused an injury to Ms. Cadman's neck and her neck was red from him trying to strangle her. RP Vol. 1 at 62. In October 2011, Lonergan,

again upset with Ms. Cadman, shoved her down on the ground. RP Vol. 1 at 62.

On November 17, 2011, Ms. Cadman was at her apartment and engaged in a text message exchange with Lonergan about whether they were going to work out their relationship. RP Vol. 1 at 45-46. Ms. Cadman still loved Lonergan, but he was talking with another woman, and so during the text message exchange she was asking him about seeing this other woman. RP Vol. 1 at 46. Lonergan then came over to Ms. Cadman's apartment, uninvited, and entered her home without permission. RP Vol. 1 at 47-48. Ms. Cadman is unaware how Lonergan gained access to her apartment, but suspected he came in through her garage because prior to this evening the garage worked, and it did not the next morning. RP Vol. 1 at 48. Lonergan was not acting his "normal self," and Ms. Cadman suspected he was high on a drug. RP Vol. 1 at 49. Lonergan was angry with Ms. Cadman and accusing her of talking to other men via text message. RP Vol. 1 at 49. Lonergan grabbed her phone despite Ms. Cadman telling him not to take it. RP Vol. 1 at 50. Lonergan screamed at her about who was sending her text messages, and became more and more angry as he approached Ms. Cadman. RP Vol. 1 at 50.

Lonergan held Ms. Cadman on the couch as she told him to leave her home. RP Vol. 1 at 50. Lonergan leaned over Ms. Cadman and put his

hands around her throat and said he was going to kill her if she didn't let him have her phone. RP Vol. 1 at 51. Ms. Cadman couldn't breathe while he had his hands around her throat and she thought she was going to die. RP Vol. 1 at 51. Lonergan would stop strangling Ms. Cadman momentarily and she told him to stop and to leave. RP Vol. 1 at 52. But Lonergan again strangled Ms. Cadman and told her he was going to kill her. RP Vol. 1 at 52. Lonergan's voice sounded upset and angry and as though he was going to follow through with the threat. RP Vol. 1 at 53. Lonergan also head-butted Ms. Cadman during this incident. RP Vol. 1 at 57. Ms. Cadman eventually allowed Lonergan to read her text message because she did not want to die over a text message. RP Vol. 1 at 53. After Lonergan read the text message, Ms. Cadman threatened to call the police and Lonergan left. RP Vol. 1 at 54.

After Lonergan left, Ms. Cadman called 911. RP Vol. 1 at 55. The 911 tape was played for the jury. RP Vol. 1 at 66-71. Ms. Cadman suffered injuries from the assault by Lonergan. RP Vol. 1 at 55-56. Photographs depicting swelling to her face and eye, and marks on her forehead were admitted. RP Vol. 1 at 55-56. Ms. Cadman also had injuries to her neck from Lonergan strangling her. RP Vol. 1 at 58. Her neck was red and had marks from where his hands were. RP Vol. 1 at 58. The injuries lasted a few days after the assault. RP Vol. 1 at 59.

Ms. Cadman was scared on November 17, 2011 that Lonergan was going to come back and kill her because he was very serious about saying he was going to kill her and was angrier than usual. RP Vol. 1 at 65.

Deputy Richard Osborne responded to Ms. Cadman's 911 call and met Ms. Cadman at her apartment. RP Vol. 1 at 101. When he arrived, Ms. Cadman appeared upset and was crying and shaking. RP Vol. 1 at 101. Deputy Osborne noticed Ms. Cadman had redness to both sides of her neck and swelling above her right eyelid and a small abrasion. RP Vol. 1 at 106.

Lonergan denied head-butting Ms. Cadman or putting his hands around her neck. RP Vol. 1 at 165-36.

The jury returned verdicts of Guilty for Assault in the Second Degree and Felony Harassment, and returned a special verdict finding Lonergan and Ms. Cadman were family or household members. CP 3, 5, 6. Lonergan and the State agreed on an offender score of 10 and the court sentenced Lonergan to 75 months, a standard range sentence. CP 10.

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B. ARGUMENT

I. LONERGAN HAD THE BENEFIT OF EFFECTIVE ASSISTANCE OF COUNSEL

a) Defense Counsel was Not Ineffective

Lonergan argues his attorney was ineffective for failing to argue that his assault and harassment convictions constituted “same criminal conduct” for sentencing purposes. To establish ineffective assistance of counsel, a defendant must show that the attorney’s performance fell below an objective standard of reasonableness and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice exists where there is a reasonable probability that, but for counsel’s performance, the result would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To satisfy the prejudice prong, Lonergan must show that the outcome probably would have been different. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). There is a strong presumption of effective assistance of counsel which a defendant must overcome to prevail on a claim. *McFarland*, 127 Wn.2d at 335.

Counsel need not make frivolous arguments that are not supported by law in order to be effective. It is reasonable that defense counsel for



Loneragan understood the law and would know that the law provides that the “same criminal conduct” provision is applied narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). Also, there is no line of case law that provides any support for the argument that assault and harassment constitute the same criminal conduct. It is therefore not ineffective for defense counsel to agree to the offender score of 10, with the current offenses counting against each other.

b) Loneragan Cannot Show Prejudice

Even if this court finds Lonergan’s attorney’s performance fell below an objective standard of reasonableness, Lonergan is unable to show the prejudice which is required to prevail on a claim of ineffective assistance of counsel. *See Strickland v. Washington, supra*. Though generally a defendant cannot waive a challenge to a miscalculated offender score, a defendant waives his right to appeal his sentence if the alleged error involves a stipulation to incorrect facts or is a matter of trial court discretion. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). A same criminal conduct analysis involves both factual determinations and matters of trial court discretion. *Id.* at 875; *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). Here, Lonergan failed to raise a factual dispute and failed to request an exercise

of the trial court's discretion. Lonergan has waived his right to raise the same criminal conduct issue for the first time on appeal. *State v. Richard Wilson*, 117 Wn. App. 1, 21, 75 P.3d 573, review denied, 150 Wn.2d 1016, 79 P.3d 447 (2003). Though Lonergan does not frame his assignment of error as miscalculation of offender score, he attacks the offender score calculation by reframing it as an effective assistance of counsel issue. However, Lonergan cannot show that any failure on his attorney's part resulted in prejudice as the decision to consider the two crimes as separate criminal conduct would not have been an abuse of discretion by the trial court. When a defendant alleges a same criminal conduct error within the context of an ineffective assistance of counsel claim, the court on appeal reviews for prejudice by determining whether the sentencing court would have concluded the current offenses were the same criminal conduct if counsel had argued the issue. *See State v. Beasley*, 126 Wn. App. 670, 686, 109 P.3d 849 (2005); *see also McFarland, supra* at 335. Lonergan is unable to meet this burden and cannot show any prejudice.

RCW 9.94A.589(1)(a) provides that "'Same criminal conduct' as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). This statute is construed narrowly

and disallows most assertions of “same criminal conduct.” *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). There are three factors which must be present for two crimes to be considered “same criminal conduct:” 1) committed at the same time and place; 2) involve the same victim; and 3) require the same criminal intent. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

To determine whether the two crimes committed involve the same criminal intent purposes for determining “same criminal conduct,” the court must examine each statute and compare them to determine whether the required intents are the same or different for each crime. *State v. Hernandez*, 95 Wn. App. 480, 484, 976 P.2d 165 (1999). When a defendant’s intent objectively changes from one crime to the other, the two crimes do not contain the same criminal intent. *State v. King*, 113 Wn. App. 243, 295, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1015 (2003). To determine where two crimes constitute “same criminal conduct,” a reviewing court should look to whether one crime furthered the other, or whether both crimes were part of a scheme or plan. *State v. Lewis*, 115 Wn.2d 294, 302, 797 P.2d 1141 (1990). If one crime can be said to have been completed before commencement of the second, then the two crimes involved different intents and do not constitute the same

criminal conduct. *State v. Grantham*, 84 Wn. App. 854, 859, 932 P.2d 657 (1997).

In *State v. Gregory Wilson*, the court of appeals reversed the trial court's finding that an assault and harassment convictions were the "same criminal conduct." *State v. Gregory Wilson*, 136 Wn. App. 596, 616, 150 P.3d 144 (2007). The facts at trial showed that Wilson had forcibly entered his and the victim's home, grabbed the victim by her hair and pulled her out of bed, and kicked her. *Id.* at 601. Wilson then left the house to speak with friends outside, then immediately returned to the home, picked up a piece of wood and threatened to kill the victim. *Id.* The Court of Appeals found that Wilson had separate criminal intents for the two acts, in part because there was a period of time, albeit short, wherein Wilson was able to reflect and form a new intent upon reentering the home to harass the victim. *Id.* at 615. The Court reasoned it must construe RCW 9.94A.589(1)(a) narrowly and disallow most assertions of "same criminal conduct." *Id.*

Lonergan did assault and harass the same victim on the same date. However, his intent in committing each of these acts was different. Ms. Cadman testified that Lonergan first put his hands around her throat, strangling her, and then, while his hands were on her throat, threatened to kill her. The assault on Ms. Cadman was technically completed before the

harassment occurred. She also testified that Lonergan separately started and stopped the assault on her multiple times. This shows a delineation in time wherein Lonergan had a moment to stop, reflect on his actions, and once again form the intent to assault her.

Lonergan argues that the felony harassment and assault occurred simultaneously and therefore he had no time or opportunity to pause, reflect and form a new criminal intent. While it is certainly true that in some cases assault could be committed in furtherance of felony harassment, and a trial court could be compelled to find that the offenses were the same criminal conduct, this is not such a case. According to Ms. Cadman's testimony, by the time Lonergan strangled her and threatened to kill her, he had already broken into her home, gotten angry at her, yelled at her and held her down on the couch. There also was a long history of domestic violence perpetrated by Lonergan on Ms. Cadman that included previous strangulations and injuries. The past incidents and Lonergan's anger that night legitimized the threat he made. The more reasonable view is that Lonergan's objective intent in assaulting Ms. Cadman was to harm her, and establish his ability to control her, not to legitimize the threat to kill. Also, it is important to note that per Ms. Cadman's testimony, Lonergan started strangling her first and then made the threat to kill her, so the assault could not have been in furtherance of the crime of harassment.

*See State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987) (holding that part of the analysis in determining same criminal conduct is whether one crime furthered the other). There is no conceivable argument that the crime of harassment was in furtherance of the assault.

The fact that assault and harassment have different criminal intents by definition supports a conclusion that they are not the same criminal conduct. *State v. Gregory Wilson*, *supra* at 615. The facts of this case, the long history of domestic violence abuse, and the severity of this attack show that the trial court below would have likely found these offenses did not constitute same criminal conduct. *See State v. Beasley*, 126 Wn. App. 670, 109 P.3d 849(2005). There is not a reasonable probability that the outcome would have differed had Lonergan's counsel argued this issue. At a minimum, this possible interpretation prevents a finding by this Court that the trial court could have only properly reached the conclusion that this was the same criminal conduct. In that case, it would not have been an abuse of discretion for this trial court to have ruled these two crimes were not same criminal conduct. Given that, Lonergan cannot establish prejudice, which is a requirement for his claim of ineffective assistance to prevail.

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C. CONCLUSION

Lonergan has not met his burden to show he received ineffective assistance of counsel. The trial court, if given the opportunity, would likely have found Lonergan's assault and harassment convictions constituted same criminal conduct. As a result, there is no prejudice to Lonergan. At a minimum, there is a reasonable basis for the trial court to have determined that Lonergan's two crimes did not constitute same criminal conduct, and therefore the trial court did not abuse its discretion and properly calculated Lonergan's offender score. Lonergan's claim fails.

DATED this \_\_\_\_\_ day of April, 2013.

Respectfully submitted:

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**April 05, 2013 - 1:38 PM**

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